



No. 462

In the Supreme Court of the United States

OCTOBER TERM, 1939

GERMANTOWN TRUST COMPANY, TRUSTEE OF THE
GERMANTOWN TRUST COMPANY BOND INVESTMENT
FUND, PETITIONER

v.
GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT

MEMORANDUM FOR THE RESPONDENT



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MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Third Circuit (R. 48-53) is reported in 106 F. (2d) 139. The unpublished memorandum opinion of the Board of Tax Appeals, entered August 24, 1938, is printed in the record at pages 16-17.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 14, 1939 (R. 52-53). The petition for a writ of certiorari was filed October 13, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below erred in taking jurisdiction of the petition to review the decision of the Board of Tax Appeals.
2. Whether the assessment and collection of the proposed deficiency in tax are barred by the statute of limitations. The answer to this question depends upon whether, under the facts, the period for assessment is governed by the provisions of Section 275 (a) of the Revenue Act of 1932 or by Section 275 (c) of that Act.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are printed in the Appendix, *infra*, pp. 10-12.

STATEMENT

This proceeding involves federal income taxes for the calendar year 1932 for which the Commissioner of Internal Revenue determined a deficiency in the sum of \$3,686. The facts were stipulated before the Board of Tax Appeals (R. 29-43), and the stipulation was adopted by the Board of Tax Appeals as its findings of fact (R. 16).

The Germantown Trust Company is a trust company organized and existing under the laws of the State of Pennsylvania, with its principal office in Philadelphia. Pursuant to authorization contained in its charter and in provisions of the laws of the State of Pennsylvania the company conducts a large trust business involving the handling of all forms of trust estates, and also acts as agent for various individuals and corporations in the custody, handling, and management of their investments. (R. 29.)

In order to afford persons of small means the advantage of investing funds in diversified high grade bonds without delay and undue expense and under conditions which would permit ready liquidation of their investment, the Germantown Trust Company, by agreement dated April 1, 1930, formed the Germantown Trust Company Bond Investment Fund, of which the Germantown Trust Company was designated trustee under the terms of the agreement. At all times material to this proceeding the Germantown Trust Company has acted as such trustee under the terms of that agreement.¹ (R. 29-30.)

On March 15, 1933, the Germantown Trust Company, as trustee under the agreement of April 1, 1930, filed a so-called "Fiduciary Return of In-

¹ A copy of the agreement of April 1, 1930, the provisions of which are not material to the questions raised by this appeal, is attached as Exhibit A to the stipulation of facts filed with the Board of Tax Appeals (R. 36-43).

come" on Treasury Form 1041 for the Germantown Trust Company Bond Investment Fund for the calendar year 1932 with the Collector of Internal Revenue for the First Collection District of Pennsylvania² (R. 35). The Germantown Trust Company, as such trustee, has never filed a Corporation Income Tax Return on Treasury Form 1120 for the Germantown Trust Company Bond Investment Fund for the year 1932 (R. 35).

The Fiduciary Return of Income on Form 1041 filed for the year 1932 by the Germantown Trust Company, as trustee, disclosed gross income of \$29,309.09 for the year 1932, consisting of interest on bank deposits, notes, bonds, etc., and deductions totaling \$2,738.51 (R. 35, 53A-53B).

On September 17, 1936, the Commissioner of Internal Revenue prepared a so-called "Substitute Return" on Form 1120 (Corporation Income Tax Return) for the Germantown Trust Company, as trustee, under the agreement of April 1, 1930³ (R. 35).

The individual participants in the fund held by the Germantown Trust Company as trustee under

² A photostatic copy of the Fiduciary Return of Income, Form 1041, filed by the Germantown Trust Company for the year 1932 was attached as Exhibit D to the stipulation filed with the Board of Tax Appeals (R. 35), and is included in the record before this Court at pages 53A-53B.

³ A photostatic copy of the "Substitute Return" prepared by the Commissioner on Form 1120 for the year 1932 was attached to the stipulation of facts as Exhibit E (R. 35), and is included in the printed record before this Court at page 53C.

the agreement of April 1, 1930, who were required to make federal income tax returns for the year 1932, included in their respective returns the shares of the income as disclosed by a schedule attached to the Fiduciary Return of Income filed by the Germantown Trust Company. The last date on which any participant in this fund filed his return was, for the purpose of this proceeding, March 15, 1933. (R. 35-36.)

On or about July 8, 1936, an Internal Revenue agent recommended that the Germantown Trust Company Bond Investment Fund be taxed as a corporation as defined by Section 1111(2) of the Revenue Act of 1932 and Article 1312 of Treasury Regulations 77 (R. 36).

On February 27, 1937, the Commissioner of Internal Revenue mailed a notice of deficiency to the Germantown Trust Company Bond Investment Fund, Germantown Trust Company, Trustee, stating, among other things, that during the year 1932 it was operating as a corporation as defined by Section 1111(2) and Article 1312, Regulations 77, Revenue Act of 1932 (R. 8-11, 36). An appeal from this notice was taken to the Board of Tax Appeals by a petition filed on May 22, 1937 (R. 4-7). The only questions raised by that petition were: (1) Whether the Germantown Trust Company Bond Investment Fund was taxable for the year 1932 as a corporation or as a trust; and (2), whether assessment and collection of the deficiency were barred by the statute of limitations at the time

the deficiency notice was mailed (R. 4-5, 15). Without passing upon the question whether the Fund was taxable as a corporation or as a trust, the Board held that the assessment of the deficiency was barred by the provisions of Section 275 (a) of the Revenue Act of 1932 prior to the date the deficiency notice was mailed (R. 16-17).

The Commissioner appealed to the Circuit Court of Appeals for the Third-Circuit, where the additional question was raised, whether that court had power to review the decision of the Board. The authority of the court rested upon Section 1002 (a) of the Revenue Act of 1926, as amended by Section 519 (a) of the Revenue Act of 1934 which permitted review by that "Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the Court of Appeals of the District of Columbia."

The Circuit Court of Appeals held that the information return filed by the taxpayer was sufficient to give it jurisdiction to review the order of the Board, but that such "return" was not a "return of the tax imposed by this title" within the meaning of Section 275 (c) of the 1932 Act and that the proposed assessment was therefore timely. It accordingly reversed the decision of the Board.

DISCUSSION

I

We do not oppose the granting of the writ on the question of the power of the Circuit Court of Appeals to review the judgment of the Board. Its decision in this regard is in conflict with *Commissioner v. Roosevelt & Son Inv. Fund*, 89 F. (2d) 706 (C. C. A. 2d). An authoritative ruling by this Court on this question will be helpful in clearing up the confusion that has arisen subsequent to the *Roosevelt & Son Inv. Fund* case.⁴

II

However, we oppose the granting of the writ on the question of the period of limitations and the applicability of Section 275 (e). On this point there is no conflict of authority. And although it involves the interpretation of language similar to that involved in the jurisdictional question, that language nevertheless has an entirely different legislative background and was properly construed by the court below. Section 275 (e) of the Act provides that where a corporation makes no return of

⁴ Thus, in order to protect itself in this very case, the Government was compelled to take two appeals, one to the Circuit Court of Appeals for the Third Circuit and one to the Court of Appeals for the District of Columbia. The latter is still pending, awaiting the final outcome of this appeal.

the income tax imposed by Title I of the Act, and where each of the shareholders includes in his individual return his distributive share of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed. The reports of the Committee on Ways and Means of the House (H. Rep. No. 1, 69th Cong., 1st Sess., p. 11) and of the Committee on Finance of the Senate (S. Rep. No. 52, 69th Cong., 1st Sess., p. 28), clearly demonstrate that the limitation provision in question, which was first enacted as Section 277 (a) (5) of the Revenue Act of 1926 (c. 27, 44 Stat. 9), was intended to cover a special class of cases of which this is one. The respective committee reports explain that the provision in question, which has been reenacted without change as Section 275 (e) of subsequent Revenue Acts—

is incorporated in the bill to make certain that if in the future the beneficiaries of a trust or the members of an association include their distributive share in their income-tax return, and if at a later date it should be held that the trust or association is subject to the corporation tax and should have made the return, the statute of limitations as applied to the trust or association shall run from the dates above specified.

It is thus plain that the Circuit Court of Appeals was justified in holding that the four-year period of limitations in Section 275 (e) was applicable rather

than the two-year period in Section 275 (a), and it is equally apparent that any superficial resemblance between this issue and the jurisdictional question is without substance.

CONCLUSION

We do not oppose the petition, but urge that the writ be limited to the question of the jurisdiction of the Circuit Court of Appeals.

Respectfully submitted.

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SEWALL KEY,

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OCTOBER, 1939.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 1002. Such decision may be reviewed—

(a) In the case of an individual, by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.

(b) In the case of a person (other than an individual), except as provided in subdivision (c), by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, or in case such person made no return, then by the Court of Appeals of the District of Columbia.

(c) In the case of a corporation which had no principal place of business or principal office or agency in the United States, then by the Court of Appeals of the District of Columbia.

(d) In the case of an agreement between the Commissioner and the taxpayer; then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement.

[U. S. C., Title 26, Sec. 641.]

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this title shall be

assessed within two years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(b) *Request for Prompt Assessment.*—In the case of income received during the lifetime of a decedent, or by his estate during the period of administration, or by a corporation, the tax shall be assessed, and any proceeding in court without assessment for the collection of such tax shall be begun, within one year after written request therefor (filed after the return is made) by the executor, administrator, or other fiduciary representing the estate of such decedent, or by the corporation, but not after the expiration of two years after the return was filed. This subsection shall not apply in the case of a corporation unless—

(1) Such written request notifies the Commissioner that the corporation contemplates dissolution at or before the expiration of such year; and

(2) The dissolution is in good faith and begun before the expiration of such year; and

(3) The dissolution is completed.

(c) *Corporation and Shareholder.*—If a corporation makes no return of the tax imposed by this title, but each of the shareholders includes in his return his distributive share of the net income of the corporation, then the tax of the corporation shall be assessed within four years after the last date on which any such shareholder's return was filed.

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 519. VENUE FOR APPEALS FROM BOARD OF TAX APPEALS.

(a) Section 1002 of the Revenue Act of 1926 is amended to read as follows:

"VENUE

"Sec. 1002. (a) Except as provided in subdivision (b), such decision may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return of the tax in respect of which the liability arises or, if no return was made, then by the Court of Appeals of the District of Columbia.

"(b) Notwithstanding the provisions of subsection (a), such decision may be reviewed by any Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing."

(b) Section 1002 of the Revenue Act of 1926, as amended by this section, shall be applicable to all decisions of the Board rendered on or after the date of the enactment of this Act, and such section, as in force prior to its amendment by this section, shall be applicable to such decisions rendered prior thereto, except that subdivision (b) thereof may be applied to any such decision rendered prior thereto. [U. S. C., Title 26, Sec. 641.]